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No. 06-1549

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In The

Supreme Court of the United States

E & L CONSULTING, LTD., doing business as C.B.C. LUMBER, CO. and C.B.C. WOOD PRODUCTS, INC.,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED, EACOM TIMBER SALES LTD. and SHERWOOD LUMBER CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it is a violation of the Sherman Act, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate one exclusive distributor, and to replace it with another.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are E & L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. and C.B.C. Wood Products, Inc. Respondents are Doman Industries Limited, Eacom Timber Sales Ltd., and Sherwood Lumber Corp.

Respondent Sherwood Lumber Corp. does not have any parent corporation and there is no publicly held company that owns 10% or more of the stock of respondent Sherwood Lumber Corp.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, is reported at 472 F.3d 23. The opinion of the United States District Court, Eastern District of New York (Trager, J.), is reported at 360 F.Supp.2d 465.

JURISDICTION

The order of the Second Circuit denying plaintiff's petition for rehearing or for rehearing en banc was entered on February 20, 2007. The petition for writ of certiorari was filed on May 18, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1)

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, as well as Fed. R. Civ. P. 12(b)(6).

STATEMENT

This action is a run-of-the-mill garden-variety jilted distributor case which does not require the attention of this Court. Accordingly, as explained below, the petition for a writ of certiorari should be denied.

Plaintiffs' amended complaint alleges that E & L Consulting, Ltd. ("E&L") became the distributor of defendant Doman Industries, Ltd. ("Doman") for green hem fir

lumber in 1990.[1] Amended Complaint, ¶8, Pet. App. 43. E&L "would take delivery, but not ownership of the green hem fir lumber," and sold it on consignment for commission. Amended Complaint, ¶12, Pet. App. 44. Plaintiffs' commission sales contract was terminable without cause upon 90 days notice, and with cause upon no prior notice. Amended Complaint, ¶14, Pet. App. 44-45. Plaintiffs' contract as a commissions sales agent was terminated by Doman effective January 30, 2004. Amended Complaint, ¶25, Pet. App. 47. Twelve days later, on February 11, 2004, plaintiff filed this antitrust action.

The amended complaint alleges that Doman controls at least 95% of the green hem fir lumber available for sale in the Northeast. Amended Complaint, ¶11, Pet. App. 44. Obviously, defendant Doman did not acquire its alleged 95% market share in the 12 days between January 30, 2004 and February 11, 2004. Plaintiff had no objection to serving as the exclusive distributor for Doman with respect to all green hem fir lumber delivered to the Red Hook port in Brooklyn for 14 years. Within 12 days of being replaced by Sherwood as Doman's distributor at the Red Hook port, however, plaintiffs suddenly complained that they were victims of an illegal monopoly.

After denying plaintiffs' application for a temporary restraining order, District Court Judge Trager granted defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), noting that plaintiffs had not adequately plead a product market. The court explained

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[1] Green hem fir lumber is a lumber product manufactured from a combination of wood from the hemlock tree and various fir trees, hence "hem fir."

that "as a matter of common sense, plaintiffs have not considered the realm of 'substitute products . . . or distinguished among apparently comparable products, or. . . . allege other pertinent facts related to cross-elasticity of demand.'" Pet. App. 28-29. The District Court also held that plaintiff had not adequately alleged "antitrust injury." Pet. App. 29-33.

On December 15, 2006, the United States Court of Appeals, Second Circuit, affirmed the dismissal of plaintiffs' complaint "principally because appellants have failed to allege facts that, if proven, would demonstrate harm to competition." Pet. App. 2. The Second Circuit pointed out that "it is not 'a violation of the antitrust laws, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor.' *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, at 244." Pet. App. 8.

After the Second Circuit denied plaintiffs' motion for a rehearing, or a rehearing *en banc*, plaintiffs filed their petition for a writ of certiorari to the Second Circuit. In an effort to attract the attention of the Court, petitioners claim that there is a split among the Second Circuit on the one hand, and the Sixth and Seventh Circuits on the other, with respect to the standard for evaluating exclusive distributorship agreements of alleged monopolists. In order to manufacture this supposed conflict, petitioners falsely characterize the Second Circuit's opinion in this case as one which effectively establishes a *per se* rule in favor of the legality of exclusive distributorships. In this regard, petitioners argue: "Thus, by its decision in this case, the Second Circuit has necessarily established a rule that exclusive distribution agreements are immune from

liability under the Sherman Act because the Second Circuit's reasoning would apply to and effectively bar a challenge under the Sherman Act to any exclusive distribution arrangement." Pet. 3.

Petitioners posit that this supposed *per se* rule of the Second Circuit is in conflict with the "rule of reason" standard applied in the Sixth and Seventh Circuits in cases such as *Byars v. Bluff City News Co.*, 609 F.2d 843, 860-863 (6th Cir. 1979), and *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 697 (2d Cir. 2006), *cert. den.*, 127 S. Ct. 1330 (2007). Pet. 10.

As explained *infra*, this is a feigned conflict among the Circuits which results from petitioners' mischaracterization of the holding of the Second Circuit in this case. The petition should be denied, as not only is the conflict feigned, but this action is a garden variety terminated distributor case which was properly decided.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS.

Plaintiffs' petition is premised entirely upon the proposition that the Second Circuit's decision in this case means that exclusive distributorships are *per se* legal when established by a monopolist. For example, petitioners pose the following as the sole question presented: "Whether an exclusive distributorship agreement can be challenged under the Sherman Act when it is alleged that the manufacturer has monopoly power over the supply of a unique product?" Pet. i. Thus, petitioners suggest that

under the Second Circuit's decision in this case an exclusive distributorship can never be challenged when the manufacturer has monopoly power. Petitioners warn that the Court of Appeals, Second Circuit, has now determined that all exclusive distribution agreements in the Second Circuit are "immune from liability under the Sherman Act." Pet. 3, 7. Plaintiffs' petition accuses the Second Circuit of having "effectively establish[ed] a *per se* rule, whether or not it is expressly stated as such." Pet. 9.

On the other hand, petitioners point out that the Sixth and Seventh Circuits apply a "rule of reason" standard in judging exclusive distributorships. Pet. 10. Thus, petitioners argue that this court's intervention is necessary to resolve the conflicting standards purportedly applied by the Second Circuit (*per se*) and the Sixth and Seventh Circuits (rule of reason).

The flaw with petitioners' argument, and it is a fatal flaw, is that the Second Circuit in no way established a *per se* rule in favor of the legality of exclusive distributorships in this case.

This Court need look no further than the decision of the Second Circuit in this case itself (Pet. App. 1-15) to confirm that the Second Circuit has not adopted such a *per se* rule. In the decision below, the Second Circuit stated "we have noted that 'exclusive distributorship arrangements are presumptively legal.' *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, at 245. ***To be sure, we have never held that all exclusive arrangements are reasonable as a matter of law.***" Pet. App. 10 (emphasis supplied).

The Second Circuit went on to distinguish at length its recent decision in *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485 (2d Cir. 2004), as an exclusive distributorship which was alleged to have involved "predatory practices designed to extend their respective temporary monopolies by deterring entry by competitors." Pet. App. 10-11. The court went on to explain that:

> The facts in *Geneva*, therefore, were quite different from the claim in a typical distribution case, like the present one, where it is alleged only that monopolist manufacturer is trying to extend its monopoly into the distribution or the sale of its product. Unlike *Geneva*, the present case is a 'run-of-the-mill exclusive distributorship controversy, where a former exclusive distributor is attempting to protect its competitive position vis a vis its supplier.' *Electronics Communs. Corp.*, 129 F.3d at 245. The complaint simply does not allege therefore, 'that the challenged action has had actual adverse effect on competition as a whole in the relevant market.' [Pet. App. 11.]

Thus, the Second Circuit made clear in its decision below that in an appropriate case, *e.g., Geneva*, an exclusive distributorship may run afoul of the antitrust laws. Thus, plaintiffs lost in the Second Circuit, not because the Second Circuit had established a *per se* rule in favor of the legality of all exclusive distributorships, but because it found that plaintiff had not alleged injury to competition in the market as a whole.

There is a difference between saying that an exclusive distributorship is "presumptively legal" and *per se* legal, as a presumption may be rebutted but a *per se* rule may not. Indeed, petitioners undercut their own argument by acknowledging in the petition that "the Second Circuit has

previously stated *in dicta* that it has not established a *per se* rule protecting exclusive distributorships from a challenge under the Sherman Act (*George Haug Co. Inc. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 140 n.1 [2d Cir. 1998]). . . ." Pet. 9.

Once petitioners' argument that the Second Circuit has established a *per se* rule in favor of the legality of all exclusive distributorship is exposed as false, it is clear that there is no inter-circuit conflict which needs the urgent attention of this court to resolve. Indeed, the Sixth and Seventh Circuit decisions cited by petitioners, *R.J. Reynolds Tobacco Co.* and *Byars*, *supra*, are cited with approval in the Second Circuit's opinion in this case. Pet. App. 9-10. Moreover, this court previously denied certiorari in the *R.J. Reynolds Tobacco Co.* case, 127 S. Ct. at 1330.

II. THE PETITION SHOULD BE DENIED BECAUSE THIS IS A GARDEN VARIETY TERMINATED DISTRIBUTOR CASE WHICH WAS PROPERLY DECIDED.

As pointed out in the Second Circuit's decision, the only harm to competition alleged by plaintiffs (Amended Complaint, ¶39, Pet. App. 50), was that "end-users of lumber and finished wood products have fewer options to purchase their required supplies and are now required to pay artificially inflated prices." Pet. App. 10. As explained by the Second Circuit: "This, by itself, is not a sufficient allegation of harm to competition caused by the exclusive distributorship, again, because the alleged single source and price increase, even if monopolistic, is something Doman can achieve without the aid of a distributor." Pet. App. 10.

The *sine qua non* of a monopolist is the ability to reduce supply, raise prices, and maximize profits. "A monopolist manufacturer of a product restricts output of the product in order to maximize its profit." Pet. App. 9. Thus, to the extent that plaintiffs have alleged any supposed harm to competition, the ability to reduce output and raise prices is the product of defendant Doman being an alleged monopolist, which is not illegal. As noted by the Second Circuit: "Appellants do not assert that Doman's market share is somehow an illegal monopoly and seek no relief on that ground." Pet. App. 9.

There is no causal connection between the harm posited (reduced output and higher prices) and the change of distributor from plaintiffs to defendant Sherwood. If Doman is a monopolist as alleged by plaintiffs, Doman can reduce output, raise prices and extract monopoly profits, whether it distributes the product itself, uses one distributor, or uses dozens of distributors. As aptly explained by the Second Circuit in its decision, "the power to restrict output to maximize profit is complete in the manufacturing monopoly, and there is no additional monopoly profit to be made by creating a monopoly in the retail distribution of the product." Pet. App. 9.

"The present case is a 'run-of-the-mill exclusive distributorship controversy, where a former exclusive distributor is attempting to protect its competitive position vis a vis its supplier.' The complaint simply does not allege, therefore, 'that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.'" Pet. App. 11 (citations omitted). Not only is the present case a garden variety jilted distributor case, it was indubitably correctly decided, and there is no

jurisprudential reason for this Court to devote any more energy to it.

III. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE IS NOT A GOOD CANDIDATE FOR REVIEW BY THIS COURT DUE TO OTHER DEFICIENCIES IN PLAINTIFFS' AMENDED COMPLAINT.

Although the Second Circuit's decision focused upon lack of injury to competition as grounds for dismissal, there are numerous other deficiencies in the amended complaint, which suggests that this case would not be a worthy one for review even if there were a split amongst the circuits.

Even if the amended complaint had not been dismissed for failure adequately to allege injury to competition, it was also dismissible for failure adequately to allege "antitrust injury." The antitrust laws were enacted for "the protection of competition, not competitors," and an antitrust complaint, in order to be upheld, must plead "antitrust injury," i.e., "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488-489 (1977). As pointed out by the Second Circuit, "the failure to allege harm to competition is analytically distinct from failure to plead antitrust injury." Pet. App. 7, n. 3. "It should go without saying, therefore, that a party cannot establish antitrust injury without establishing a violation of the antitrust laws, which, under Section 1, must involve an injury to competition." Pet. App. 7. As found by Judge Trager at the District Court level: "The conclusory and, at times, implausible nature of plaintiffs' allegations fail to

establish any antitrust injury and are not sufficient to make out a claim under the antitrust laws, even at this early stage of the litigation." Pet. App. 33.

The amended complaint also failed adequately to allege antitrust standing, which is distinct from "antitrust injury." The amended complaint alleges monetary injury to lumber yards and to home builders and purchasers of new homes. Amended Complaint, ¶36, Pet. App. 49. Plaintiff E&L is a commission sales agent, however, and is neither a lumber yard, nor a home builder, nor an end purchaser and lacks standing to seek to recover any such alleged damages herein. *See, e.g., George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 140 (2d Cir. 1998) (automobile parts and service provider is not a Rolls Royce dealership, and therefore did not have standing to assert any antitrust injuries suffered by Rolls Royce dealerships); *Argus, Inc. v. Eastman Kodak Co.*, 612 F. Supp. 904 (S.D.N.Y. 1985), *aff'd*, 801 F.2d 38 (2d Cir. 1986) (neither distributor nor licensor had standing to raise antitrust claims concerning a restraint at manufacturer's level); *A.G.S. Electronics, Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 711, *aff'd*, 591 F.2d 1329 (2d Cir. 1978) (amended complaint dismissed due to lack of an antitrust standing where the only injuries which the distributor complained of "all flow from the termination of its distributorship rather than any anticompetitive effects of the defendants' acquisition"); *GKA Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir. 1995) (distributors may have suffered injury as a result of loss of their distributorships, but it was not direct antitrust injury which they had standing to assert).

The only harm alleged by plaintiffs is harm to themselves as competitors, but not harm to competition market wide, resulting in lack of antitrust injury and antitrust standing, which doom the case in any event. Another fatal flaw in plaintiffs' Sherman Act claims found by Judge Trager is that plaintiffs' amended complaint failed adequately to define the product market because it failed "to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand." Pet. App. 25. The allegations in the amended complaint that green hem fir lumber is a product market unto itself, because there are no substitutes, does not meet minimum plausibility requirements for a complaint in a federal antitrust action. *See, e.g., Bell Atlantic Corp. v. Twombly*, 2007 U.S. LEXIS 5901 (May 21, 2007).

There are so many deficiencies in plaintiffs' Sherman Acts claims, providing so many alternative grounds for dismissal, that review of any one ground is pointless due to the existence of numerous alternative grounds for dismissal. Since plaintiffs' petition seeks review only of the Sherman Act claims, defendant Sherwood will not address the numerous deficiencies in plaintiffs' non-Sherman Act claims.

CONCLUSION

"[When] the allegations in the complaint, however true, cannot raise a claim of entitlement to relief, 'this basic deficiency . . . should be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at *26-27. The petition for a writ of certiorari should be denied.

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